Office-Supreme Court, U.S.
FILED
OCT 17 1964
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 600

AVIS B. VOORHES, WILLIAM G. VOORHES, AND RUDOLPH PRESUTTI,
Appellants,

v.

JOHN DEMPSEY, ET AL;
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

COLIN C. TAIT
750 Main Street
Hartford 3, Connecticut
IGOR I. SIKORSKY, JR.
111 Pearl Street
Hartford 3, Connecticut
RICHARD M. RITTENBAND
75 Pearl Street
Hartford 3, Connecticut
Attorneys for Appellants

SUBJECT INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Statutes Involved	3
Questions Presented	3
Statement of Facts	4
The Questions Are Substantial	6
I. The use of mandatory party levers denies the independent voter equal protection of the laws as guaranteed by the Fourteenth Amendment.	8
II. The party lever, whether mandatory or optional, violates the rights of all voters to a secret ballot and also thus denies their right to a free selection.	9
Conclusion	11
Appendix	
Opinion of the United States District Court, District of Connecticut	13
Connecticut General Statute § 9-242	17

TABLE OF CITATIONS

CASES:	PAGE
American Federation of Labor v. *Watson*, 327 U.S. 582, 592-93 (1946)	2
Anderson v. *Martin*, 375 U.S. 399, 112 L.Ed. 430, 84 S.Ct. 454; 32 Law Week 4101 (1963)	7
Davis, Secretary, State Board of Elections, et al. v. *Mann, et al.*, 374 U.S. 803 (1963)	3
Eaton v. *Brown*, Calif. 1892, 31 P. 250	8, 9
Helme v. *Board of Election Com'rs*, 149 Mich. 390, 113 N.W. 6 (1907)	10
Johnson v. *Clark*, 25 F.Supp. 285 (N.D. Tex. 1938)	7
Kautenburger v. *Jackson*, 85 Ariz. 128, 333 P.2d 293, 295 (1958)	6
McConnell, et al. v. *Frink, Sec'y of State of Alabama, et al.*, 374 U.S. 802 (1963)	3
Norris v. *Mayor & City Council*, 172 Md. 667, 192 A. 531 (1937)	8
Reynolds, Judge, et al. v. *Sims, et al.*, 377 U.S. 533 (1963)	3
Roman v. *Sincock*, 375 U.S. 877 (1963)	3
Smith v. *Blackwell*, 115 F.2d 186 (4 Cir. 1940)	7
State v. *Green*, 121 Ohio St. 301, 168 N.E. 131 (1929) 66 ALR 894	8
State v. *Keating*, 53 Mont. 371, 163 P. 1156 (1917)	8
Vann, et al. v. *Baggett*, 377 U.S. 533 (1963)	3

STATUTES:	
General Statutes of Connecticut, Rev. of 1958, Section 9-242	3, 4, 5, 17
42 U.S.C. § 1983, 1988	2, 4
28 U.S.C. § 1343 (3) and (4)	2, 4
28 U.S.C. § 2281	2, 4
28 U.S.C. § 1253	2, 4

In the

Supreme Court of the United States

OCTOBER TERM, 1964

No.

AVIS B. VOORHES, WILLIAM G. VOORHES, AND RUDOLPH PRESUTTI,
Appellants,

v.

JOHN DEMPSEY, ET AL,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

Judgment Appealed From

Appellants, Avis B. Voorhes, William G. Voorhes, and Rudolph Presutti, appeal from the final judgment of the specially-constituted United States District Court for the District of Connecticut. Appellants submit this Statement to show that the Supereme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Opinion of the United States District Court for the District of Connecticut which is the subject of this appeal is not yet reported. A copy of the Opinion granting the defendants' Motion for Dismissal of Action is attached hereto as Appendix A.

Jurisdiction

This action was brought by voters in the U. S. District Court for the District of Connecticut under 42 U.S.C. § 1983 and 1988 and 28 U.S.C. § 1343 (3) and (4) to restrain and enjoin the enforcement of certain provisions of the General Statutes of the State of Connecticut which make a party lever mandatory on all voting machines in the said state on the grounds that these statutes impair certain rights of the named plaintiffs and all others similarly situated under the Fourteenth Amendment of the United States Constitution.

A special three judge court was convened to determine the cause pursuant to 28 U.S.C. § 2281 et seq. In due course the defendants filed a Motion to Dismiss which was granted on June 22, 1964 and judgment was entered dismissing the action on June 23, 1964. From this judgment the plaintiffs appealed.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253. The following decisions sustain the jurisdiction of this Court to review a judgment on direct appeal from a three judge district court:

> *American Federation of Labor* v. *Watson*, 327 U.S. 582, 592-93 (1946);

and the following reapportionment cases in the October 1963 Term of the Supreme Court of the United States:

Reynolds, Judge, et al. v. *Sims, et al.*, 377 U.S. 533 (1963); *Vann, et al.* v. *Baggett, Sec'y etc.*, 377 U.S. 533 (1963);

McConnell, et al. v. *Frink, Secretary of State of Alabama, et al.*, 374 U.S. 802 (1963) (probable jurisdiction noted);

Davis, Secretary, State Board of Elections, et al. v. *Mann, et al.*, 374 U.S. 803 (1963) (probable jurisdiction noted);

Roman v. *Sincock*, 375 U.S. 877 (1963) (probable jurisdiction noted).

Statutes Involved

Section 9-242 of the Connecticut General Statutes (1958 Rev.) is the statutory provision involved, and this statute is set forth in Appendix B attached hereto.

Questions Presented

The following questions are presented by this appeal:

A. Whether the Constitution of the United States requires the State to provide its citizens a means or method of voting wherein absolute secrecy is preserved.

B. If the answer to the Question A above is "Yes" whether the right to absolute secrecy would be violated by a system of voting whereby a voter may not split his ticket without revealing to those outside the voting booth the fact that he is not voting a straight party ticket.

C. Whether the mandatory party lever established by the Connecticut General Statutes denies the plaintiffs their right to free selection by placing upon them mental and psychological pressure to merely and solely pull a party lever.

D. Whether the mandatory party lever established by § 9-242 of the Connecticut General Statutes subjects independent voters of said state to a more burdensome condition in casting their vote than the conditions to vote required of voters registered in a party.

E. Whether the mandatory party lever established by the Connecticut General Statutes denies Independent voters of said state equal protection of the law.

F. Whether the mandatory party lever is class legislation establishing a preferential group accorded privileges and immunities not granted to other voters.

Statement of Facts

All Connecticut voting machines are equipped with a mandatory party lever. This means that a Connecticut elector cannot vote for any candidate without first pulling a party lever to unlock the machine. If there is a particular candidate on the party slate for whom he does not want to vote, the elector must specifically reject that candidate by pushing up a key assigned to his name. The elector may then vote for another candidate for that particular office by depressing the key assigned to him, or by writing in the name of a candidate not on the ballot. Each party lever (or "straight ticket device," as it is called in the statute) on every voting machine is connected to a common bell so that said bell is caused to ring whenever the party lever is operated. The requirements for both the mandatory party lever and the bell are embodied in § 9-242 of the Connecticut General Statutes, Revision of 1958, Revised to 1964, which is set out in Appendix B of the Jurisdictional Statement.

Appellants, who are three Connecticut voters, brought this action on behalf of themselves and others similarly situated under 42 U.S.C. § 1983 and 1988, and 28 U.S.C. § 1343, to

enjoin the operation of Connecticut voting machines equipped with a mandatory party lever and to have § 9-242 of the Connecticut General Statutes declared unconstitutional. Plaintiffs named as defendants the Governor and the Secretary of the State, both of whom are election officials of the State of Connecticut. The complaint alleged that the mandatory party lever system employed by Connecticut violates the Fourteenth Amendment to the United States Constitution because it:

(1) denies the plaintiffs their right to a secret ballot, for those outside the booths can tell whether an elector has voted for a split ticket by listening for the clicking of the individual keys and noting the longer time required to vote;

(2) subjects independent voters to more burdensome conditions than party voters;

(3) denies the plaintiffs their right to a free selection through mental and psychological pressure to restrict their voting efforts to pulling a party lever.

In due course the defendants filed a Motion to Dismiss for failure to state a claim upon which relief can be granted, which was granted on June 22, 1964; judgment was entered dismissing the action on June 23, 1964. The Memorandum and Order filed by the District Court, and the Judgment entered by it, are set out in Appendix A attached hereto. In brief, the Court adjudged that no claim was made upon which relief could be granted on the grounds that:

(1) There was no allegation that the broad discretion vested by the Federal Constitution in the states to formulate election systems had been abused.

(2) The use of the mandatory party lever, while operating as a discrimination against the independent voter, is not such an unreasonable discrimination that the independent voter is deprived of the equal protection of the laws.

(3) Even if the Federal Constitution requires a secret ballot, such a requirement does not extend to the possibility that others might discover a lack of party fealty on the part of a voter, because he has split his vote.

The Questions are Substantial

There are 1,279,029 registered voters in Connecticut; of these 469,185 classify themselves as "independent." These unaffiliated voters should not be forced to act as party members when casting their votes – not even momentarily. It is contrary to our basic principles to be forced to vote and then to "unvote," in order to choose our candidates for public office. Some measure of the burden imposed by the mandatory party lever system may be found in the fact that since 1945 bills to abolish the party lever have been introduced at every legislative session in Connecticut.

The Judgment of the specially-constituted District Court, however, says in essence that the alleged burdens placed upon voters by the mandatory party lever are so insubstantial as not to require plenary consideration. The plaintiffs respectfully disagree with this conclusion and affirm that there is a constitutional right to absolute secrecy of the ballot and absolute equality in the method and technique of casting a ballot. It has been held that a state statute which prevented a candidate's name from ever appearing at the head of the lists on voting machines was unconstitutional because it deprived the candidate of a right protected by the privileges and immunities clause of the Constitution. *Kautenburger* v. *Jackson*, 85 Ariz. 128; 333 P.2d 293, 295 (1958). There the Arizona Supreme Court said:

> "It has been recognized, we think correctly, that it is a commonly known and accepted fact that where there are a number of candidates for the same office, the

> names appearing at the head of the list have a distinct advantage."

That reasoning applies with at least equal force to those candidates from the two major parties whose names appear on Connecticut voting machines. Conversely, it follows that much of the unfair advantage thus attained is a result of the burden under which the independent voter must cast his vote. Thus, the state-sanctioned burden denies the independent voter the equal protection of the laws guaranteed him by the Fourteenth Amendment. *Anderson* v. *Martin*, 375 U.S. 399, 112 L.Ed. 430, 84 S.Ct. 454; 32 Law Week 4101 (1963).

The District Court, in its Memorandum of Decision, assumed without deciding that the Federal Constitution or statutes require a secret ballot. *Thus the important questions of whether there is a federally-protected right to a secret ballot, and — if it does exist — the extent of its scope, are presented by this appeal,* which questions affect each voter, not only of Connecticut, but of the United States.

In *Johnson* v. *Clark*, 25 F. Supp. 285 (N.D. Tex. 1938), the court was concerned with the meaning of "ballot" as it is used in Title 2, U.S.C.A. § 9, in providing that the manner of voting "shall be by written or printed ballot, or by machine." The court said at page 286:

> "The word 'ballot' in an election provision means a method which will insure, so far as is possible, the secrecy and integrity of the popular vote."

Smith v. *Blackwell*, 115 F. 2d 186 (4 Cir. 1940), however, seemed to deny the existence of a constitutional right to secrecy, and held that there was no "case or controversy" when certain electors tried to maintain a declaratory judgment action against the Secretary of State of South Carolina, where

he was not specifically charged with any duty by the South Carolina statutes to preserve secrecy of the ballot.

With deference to the Court of Appeals for the 4th Circuit, we feel that the court in *Johnson* reached the correct conclusion. A ballot originally consisted of a ball, bean, a grain of corn, or other small article which could be concealed in the hand so that others might not know how the voter cast his ballot. It implies secrecy in the matter of voting, and any act by which an elector, in secrecy, casts his vote for or against a candidate or an issue constitutes a ballot. See *Norris* v. *Mayor & City Council*, 172 Md. 667, 192 A. 531 (1937); *State* v. *Green*, 121 Ohio St. 301, 168 N.E. 131 (1929), 66 ALR 849. See also *State* v. *Keating*, 53 Mont. 371, 163 P. 1156 (1917).

I. The Use of Mandatory Party Levers Denies the Independent Voter Equal Protection of the Laws as Guaranteed by the Fourteenth Amendment.

The basic feature of the party lever is by definition that it improperly discriminates against small political parties and the independent voter by forcing said independent voter to vote for a major party as a condition precedent to voting. The independent voter is the one class of voter, as opposed to electors enrolled in a political party, who must first pull a lever of a party in which he is not enrolled before he can vote. This is discriminatory and places psychological coercive pressure upon him to vote for either party slate instead of splitting his ballot. In a case involving a paper ballot the question was raised whether paper ballots which had printed blocks for the major parties were proper. Under the statute under consideration in that case a voter could check a block and vote for a party slate or check individual blocks for each office. In that case the California Supreme Court in *Eaton* v. *Brown*, *infra* held that the use of such party blocks on the ballot was unconstitutional and void because "it is an attempt to discrimi-

nate against classes of voters and its effect, if allowed to be valid, would be to subject such classes to the alternative of partial disenfranchisement, or to the casting of their votes upon more burdensome conditions than others no better entitled under the fundamental law to the free and untrammeled exercise of the right of suffrage." The Court went on to state that such party labels were unconstitutional because,

> "it would be of no benefit to any party to allow it a ticket heading unless it had a full state and local ticket, for no voter of the party could express his choice by stamping the party designation without partial or total disenfranchisement . . . upon these grounds we hold that this provision destroys the just and equal and uniform operation which is an election law, of all others, is demanded, no less by the express terms of our fundamental law than by the genius and spirit of our institutions . . . There should be no party designation printed at the head of the tickets because there can be no voting by stamping such designation."
>
> *Eaton* v. *Brown*, Calif. 1892; 31 P. 250.

This is the precise issue presented by this case and its reasoning is persuasive for the appellants' contention that a party lever discriminates against independent voters and small parties, and subjects all such voters to an unequal burden in the casting of their ballot; and thus denies them equal protection of the laws as well as the right to a free selection.

II. The Party Lever, Whether Mandatory or Optional, Violates the Rights of All Voters to a Secret Ballot and Also Thus Denies Their Right to a Free Election.

Without absolute secrecy being insured, men would feel constrained to vote in certain ways out of fear of reprisal, and not by exercise of free choice. Therefore if we assume – as did the District Court in granting defendants' Motion to Dis-

miss – that there is a discernible sound which is emitted when a voter splits his ticket using the mandatory party lever, the question now is whether the right to a secret ballot is violated by such a system. That is, assuming there is a right to a secret ballot, does the right include a requirement that no one be able to ascertain whether a voter has split his ticket?

In *Helme* v. *Board of Election Com'rs*, 149 Mich. 390, 113 N.W. 6 (1907), the Michigan Supreme Court invalidated the use of an election machine which could not handle all the issues and candidates, so that a voter had to ask for a paper ballot to vote in a split ticket. The statute providing for the machine was held unconstitutional because it failed to afford secrecy of the vote. The court said:

> "It is obvious that a voter cannot ask for and vote such a ballot without indicating that he does not vote for his full party ticket, and, to the degree that he is reluctant to have his want of party fealty known, it acts as a deterrent to his voting for the persons of his choice, and operates against his independence as a voter."

Similarly, if a Connecticut party-member cannot split his ticket without indicating to those outside the voting booth (required by law to be members of the major parties) that he has done so, the element of coercion must be felt, in denial of his right of free choice.

The District Court's opinion discounts the effect of the ascertainability of ticket-splitting by saying that no one can tell which candidates or party a voter has chosen. This argument defines secret ballot too narrowly. If the necessity for a secret ballot is to be found in the importance of insuring that every man follow his conscience when voting, then a broader scope must be given to secrecy. It must include the inability on the part of anyone to determine who is a ticket-splitter.

Conclusion

The questions involved in this appeal are substantial and ought to be resolved by this Court. The unfettered right of suffrage, essential to a democratic society, is being denied to 1,279,029 Connecticut voters by the mandatory party lever system. Whether it is to continue is of such fundamental importance that it ought now to be determined by this Court.

Respectfully submitted,

COLIN C. TAIT
750 Main Street
Hartford 3, Connecticut

IGOR I. SIKORSKY, JR.
111 Pearl Street
Hartford, Connecticut

RICHARD M. RITTENBAND
75 Pearl Street
Hartford, Connecticut

APPENDIX A

United States District Court
District of Connecticut

AVIS B. VOORHES, ET AL, *Plaintiffs* v. JOHN DEMPSEY, Governor of the State of Connecticut, and ELLA T. GRASSO, Secretary of the State of Connecticut, *Defendants*	Civil Action No. 10,462

MEMORANDUM OF DECISION
ON
MOTION TO DISMISS

Three Connecticut voters, on behalf of themselves and others similarly situated, bring this action under the Civil Rights Acts, 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. § 1343, to enjoin the operation of Connecticut voting machines equipped with a mandatory party lever and to have Section 9-242 of the Connecticut General Statutes (1958 Rev.), which requires that the machines be so equipped, declared unconstitutional. The defendants, the Governor and Secretary of the State of Connecticut, have moved to dismiss the complaint for failure to state a claim upon which relief can be granted. We find the complaint fatally deficient and grant the motion to dismiss.

Section 9-242 of the Connecticut General Statutes provides that all voting machines in Connecticut shall be equipped with

party levers but "shall permit an elector to vote for any person for any office, whether or not nominated as a candidate by any party or organization, and shall permit voting in absolute secrecy." Any Connecticut elector is free to vote or not to vote for any candidate; however, since a party lever must be pulled to unlock the machine, the elector must specifically reject any candidate on the party slate for whom he does not wish to vote by pushing up a key assigned to that candidate's name. The elector may then vote for another candidate for that particular office by pushing down the key assigned to the candidate of his choice or by writing in the name of a candidate not on the ballot.

The complaint alleges that the mandatory party lever system employed by Connecticut violates the Fourteenth Amendment to the United States Constitution because it:

(1) denies the plaintiffs their right to a free selection through mental and psychological pressure to restrict their voting efforts to pulling a party lever;

(2) subjects independent voters to more burdensome conditions than party voters;

(3) denies the plaintiffs their right to a secret ballot, for those outside the booths can tell whether an elector has voted for a split ticket by listening for the clicking of the individual keys and noting the longer time required to vote.

The allegations of the complaint plainly fail to state any claim upon which this court may grant relief. Under the Federal Constitution the states have been entrusted with broad discretion in formulating an election system. *United States* v. *Classic*, 313 U.S. 299, 311 (1941), and nothing in the complaint indicates that this discretion has been abused. The mandatory party lever statute does not deny any candidate a place on the ballot, nor does it prevent any voter from voting

for any candidate. A vote for a straight ticket is accorded no greater weight in the final tallies than a vote for a split ticket. While the wisdom of the mandatory party lever statute may be questionable, it can hardly be termed fundamentally unfair or unreasonably discriminatory in contravention of the Fourteenth Amendment. Indeed, the disadvantaging inconvenience to split ticket voters from the Connecticut statute would appear to be much less than the New Jersey statutes, sustained by a three judge court in *Voltaggio* v. *Caputo*, 210 F.Supp. 337 (D.C.N.J.), app'l dismissed, 371 U.S. 232 (1962), denying an independent candidate the opportunity to have his name listed on the ballot with the top group of candidates. Cf. *McDougal* v. *Green*, 335 U.S. 281 (1948).

The utilization of party levers, be they optional or mandatory discriminates against the independent voter to the extent the latter must spend more time and effort to vote for the same number of candidates than one who votes for a straight ticket. However, there is a rational basis for this discrimination, for the party lever simplifies and speeds up the voting process for large numbers of voters. It is for the legislature to determine the wisdom of making such a discrimination for this purpose. We are unable to see that the slight extra effort required for an independent voter to pull a party lever and reject candidates for whom he does not care to vote constitutes such a burdensome and unreasonable discrimination that the independent voter is deprived of the equal protection of the laws.

Assuming, but without deciding, that the Federal Constitution or statutes require a secret ballot,[1] the party lever does not deprive voters of a secret ballot. No one outside the booth can tell for which candidates or party a ballot has been cast,

[1] Compare *Johnson* v. *Clark*, 25 F.Supp. 285 (N.D. Tex. 1938) with *Smith* v. *Blackwell*, 115 F.2d 186 (4 Cir. 1940).

or indeed, whether an elector has voted for any candidates at all. Plaintiffs' claim of an unsecret ballot amounts actually only to the possibility that a voter may be subjected to an accusation of a lack of party fealty for having split his vote, a far cry from an unsecret ballot. Even this accusation may be wholly false, for a voter may finally vote a straight ticket after rejecting certain candidates by pushing their individual keys back up. For all practical intents and purposes, the Connecticut procedure is a secret ballot.

Nor is there any federal statute upon which relief may be granted. The only federal statute relating to the mechanics of voting (other than absentee ballots) which has come to our attention is 2 U.S.C. § 9, which simply provides: "All votes for Representatives in Congress must be by written or printed ballot, or voting machine the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect." Obviously nothing in this statute can be construed to prohibit a state from authorizing the use of a voting machine equipped with a mandatory party lever. Cf. *Smith* v. *Blackwell*, 115 F.2d 186, 189 (4 Cir. 1940).

The motion to dismiss the complaint is granted.

J. Joseph Smith,
United States Circuit Judge

Robert P. Anderson,
United States District Judge

M. Joseph Blumenfeld,
United States District Judge

June 22, 1964.

APPENDIX B

Statute 9-242

"§ 9-242. Construction requirements

A voting machine approved by the secretary of the state shall be so constructed as to provide facilities for voting for the candidates of at least seven different parties or organizations. It shall be provided with a single straight ticket device for each of such parties, by the use of which an elector may vote for all the candidates of that party, and shall permit an elector to vote for any person for any office, whether or not nominated as a candidate by any party or organization, and shall permit voting in absolute secrecy. Any such machine shall have a bell which shall be so connected to the straight ticket device for each party as to ring whenever any straight ticket device is operated; each straight ticket device on such machine shall be so connected to the same bell. Such machine shall be so constructed that an elector cannot vote for a candidate or on a proposition for whom or on which he is not lawfully entitled to vote. It shall be so constructed as to prevent an elector from voting for more than one person for the same office, except when he is lawfully entitled to vote for more than one person for that office, and it shall afford him an opporunity to vote for only as many persons for that office as he is by law entitled to vote for, at the same time preventing his voting for the same person twice. It shall be so constructed that all votes cast will be registered or recorded by the machine, and shall be provided with a lock by means of which any illegal movement of the voting or registering mechanism is absolutely prevented. It shall be capable of adjustment for use at primaries so as to permit voting for indi-

vidual candidates without first operating a straight ticket device. Any such machine which has a curtain lever which is not visible to the election officials while the machine is being operated shall have a bell so attached to the curtain lever as to ring when the curtain lever is closed. (1949 Rev., § 1191; 1953, Supp. § 719d; 1957, P.A. 561, § 4.)"